80-604

No.

Supreme Court, U. S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

JAMES WALKER,

Petitioner,

v.

MARION S. BARRY, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMES WALKER,
Pro Se.
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(202) 723-0593

QUESTIONS PRESENTED FOR REVIEW

1. Did the letter of the petitioner written February 1, 1974 to the Assistant Personnel Officer and an Associate Director (Floyd A. Patterson and William H. Whitehurst), complaining about a non-veteran being promoted over the Petitioner establish the claim of Veterans Preference for the Petitioner, there being no response to the said letter?

2. Can a governmental agency (officers, servants, employees or attorneys) demand that some of its employees (who occupy competitive civil service positions) fill-out and sign a document depicting the amount of time spent on various assignments and exempt other employees from doing the same for the said document?

3. (a) Can a lower grade government employee be appointed to supervise a higher grade government employee?

(b) Is there a "break in the chain of command" when a lower grade government employee supervises a higher grade government employee?

(c) If there is a "break in the chain of command" where does authority lie?

4. Can a government employee who occupies a competitive civil service position be denied the right to exercise a Constitutional right?

5. Was the Petitioner deprived of rights, privileges, and immunities secured under the Constitution of the United States: Fourth, Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States?

6. Was the Petitioner systematically denied equality of opportunity for advancement?

7. Since the District of Columbia Government has invoked "early out" by Reduction In Force procedures during the period of litigation for the Case before the Bar and since the Petitioner was over 51 years of age with 22 years of governmental service at the time of dismissal, does the Petitioner qualify for retirement on an immediate annuity?

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IN THE

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No.

JAMES WALKER,

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MARION S. BARRY, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Petitioner, James Walker, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on 30 June 1980.

OPINION BELOW

The Court of Appeals entered its opinion granting summary affirmance on 30 June 1980. Petition for rehearing was denied on 16 July 1980. A copy of the Opinion is attached as Appendix A. A copy of the Order denying the petition for rehearing is attached as Appendix B. A copy of "Early Out" Retirement announcement is attached as Appendix C.

JURISDICTION

The District Court concluded that it had jurisdiction conferred by 5 U.S.C. Section 702. The Court of Appeals affirmed jurisdiction citing 28 U.S.C. Section 1331. The jurisdiction of this Court is invoked under Section 1361 and 1391 of Title 28, U.S.C.A.; Section 1331, 2201, and 2202 of Title 28 of the United States Code; the Administrative Procedure Act; Section 1983, Title 42, U.S.C.; Fifth Amendment to the Constitution of the United States; Fourth Amendment to the Constitution of the United States; Eighth Amendment to the Constitution of the United States; Fourteenth Amendment to the Constitution of the United States; and the General Equity Powers of the Court.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV:

> . . . to be secure in their person . . . against unreasonable search and seizures.

United States Constitution, Amendment V:

> . . . due process . . . witness against self.

United States Constitution, VIII Amendment:

> . . . cruel and unusual punishment.

United States Constitution, Amendment XIV:

> . . . due process . . . equal protection of the law.

STATEMENT OF THE CASE

Petitioner wrote a letter February 1, 1974 to officers of the District of Columbia Government complaining about a non-veteran being promoted over him. No response was received from the said letter. On December 2, 1977, the Petitioner was dismissed from his permanent competitive civil service position of the District of Columbia Government. The Civil Service Hearing of April 14, 1978 affirmed the dismissal. (Decided August 9, 1978; Decision Number DC752B80321). The District Court found jurisdiction pursuant to 5 U.S.C.A. Section 702 (1976). November 19, 1979 summary judgment was granted and the decision of the Civil Service Commission affirmed. (C.D. No. 78-2421). The Opinion of the Court of Appeals was filed 30 June 1980. The Petition for rehearing was denied 16 July 1980. (No. 79-2411).

REASONS FOR GRANTING THE WRIT

1. The letter of the Petitioner written February 1, 1974 to Floyd A. Patterson and William H. Whitehurst, complaining about a non-veteran being promoted over the Petitioner, established the claim of Veterans Preference for the Petitioner, there being no response to the said letter.

Subsequent to the Supreme Court action on Koeflgen v. Jackson, 355 F Supp 243, 410 U.S. 976, a non-veteran, white male was given the position for which the Petitioner had applied. No response was received to the complaint of the Petitioner sent and verified by certified mail. The failure of the agency to respond, estops the agency from denying the conclusions of the said complaint Veterans Preference. Therefore, the claim of Veterans Preference was established by the said complaint.

In Paepcke v. Peters, United States District Court for D.C., Civil Action Docket 2813-61, the Court ruled:

> "failure to claim (or deny) earlier estops claiming or denying later."

Koeflgen v. Jackson asserts that the veteran has preference for job and promotion. A most recent Supreme Court Decision, 78-233, Personnel Administration of Massachusetts v. Feeney, gives Veterans an "absolute lifetime preference" in hiring and promotion in public jobs.

2. A governmental agency (officers, servants, employees, or attorneys) cannot demand that some of its employees fill-out and sign document depicting the amount of time spent on various assignments and exempt other employees from doing the same for the said document.

On page 76 of the Record (Civil Service), testimony showed that not all employees of the Department of Human Resources were required to execute the document "program activity record." The policy of requiring some employees to comply and exempting others violates the 14th Amendment clause of "equal protection of the law." Ali v. N.Y. State Boxing Commission, 316 F Supp 1246.

On page 30 of the Record, witness Warren testified that the program activity record was a "new methodology." However, on page 95, Witness Ramseur testified and identified a document dated June 17, 1964 on which her name appeared, that the program activity record was not used from 1967 through 1976 and that the Agency still received re-imbursemtn funds. On page 123 of the Record, witness Bostick testified that someone wanted to inquire in 1976 about the operations of Research and Statistics. It would appear that the Pro-

gram Activity Record is for exposure. In Watkins v. United States, 354 U.S. 778 (1957) "exposure for the sake of exposure violates 5th Amendment due process."

The Program Activity Record is indefinite and vague. One statement says "Add Executive and Support." Another statement says "Do not Add Executive and Support." Baggett v. Bullitt, 377 U.S. 360 (1964) . . . "too vague to afford the taking of due process of law under the 14th Amendment." Elfbrandt v. Russell, 384 U.S. 11 (1966) . . . unconstitutional (too broad).

Discovery and the Record page 30 have shown that no specific document enanated from the Federal Office of Health, Education, and Welfare demanding the specific document captioned "Program Activity Record" be executed by employees of the District of Columbia Government. The dismissal is vitiated on this point. Bennett v. United States, 174 Ct Cl. 492, 356 F.2d 525, vac. 87 S.Ct. 39, 385 U.S. 4, 17 L.Ed.2d 4.

In Yick Wo v. Hopkins, 118 U.S. 356 (1886) the Rule of Law is:

> "A valid law unevenly and discriminatorily administered violates the Equal Protection Clause of the Constitution."

The "Program Activity Record" is not only unlawful and invalid, but the administration of the same clearly violates the Equal Protection Clause of the Constitution by the demand that a certain group of employees execute the same, but others be exempted from the same.

3. (a) A lower grade government employee cannot be appointed to supervise a higher grade government employee.

(b) There is a "break in the chain of command" when a lower grade employee supervises a higher grade employee.

(c) When there is a "break in the chain of command" no competent authority exists.

Witness Chamberlain testified that he had supervised a GS Grade level higher than himself. Witness Ramseur testified that she was Acting Chief for about eight months (1975-76) and had supervised people with higher grade levels than herself: Grover Chamberlain GS 14 and Gary Kreizman GS 15. The "break . . ." occurred before and during the alleged insubordination.

4. A government employee cannot be denied the right to exercise a Constitutional Right.

The exercise of the 5th Amendment is a Constitutional Right. In Keyishian v. University of New York Board of Regents, 384 U.S. 589, 17 L.Ed.2d 629, 87 S.Ct. 675 . . . "cannot be denied the right to exercise Constitutional Rights."

The Record shows that the Agency operates on the theory of "carry out any order and then grieve." Such theory does not meet the requirements of law. In Schmidt v. United States, 145 Ct. Cl. 632, 636; 153 Ct. Cl. 407 and Knott v. United States, 128 Ct. Cl. 489, held:

> "an unlawful order does not have to obeyed. Hence a refusal to obey is not insubordination."

5. The Petitioner was deprived of rights, privileges, and immunities secured under the Constitution of the United States: Fourth, Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

Self incrimination becomes automatic by signing any document. The United States Supreme Court has held in Garrity v. State of New Jersey in January 16, 1967, 385 U.S. 493, 17 L.Ed.2d 562, 87 S.Ct. 616 . . . "the option

to loose the means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice."

The attempt to force the Petitioner to execute a document captioned "Program Activity Record" in addition to denial of equal protection of the law, due process, self-incrimination is an illegal search of the mental process and the physical agility of the Petitioner. The right of protection and security was enunciated by the United States Court of Claims decided March 17, 1967, 179 Ct. Cl. 151, Saylor v. United States. In Saylor under the phrase "evidence submitted, in employees dismissal procedure means, evidence submitted without violating the Constitution of the United States, including the right protected by the Fourth Amendment."

Recent Supreme Court Decisions: 78-5066, Dunaway v. N.Y. and 77-6673, Brown v. Texas, provide new protection under the Fourth Amendment of the Constitution. The instant Case before the Bar is reinforced for the Petitioenr by these cases.

In Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) the Rule of Law:

> "The right to mental privacy, although not explicitly stated in the Bill of Rights, is a penumbra. formed by certain other explicit guarantees. As such, it is protected against State regulations which sweep unnecessarily broad."

The various guarantees which create penumbras, or zones of privacy include the First Amendment right of association, the Third Amendment prohibition against the peacetime quartering of soldiers, the Fourth Amendment's prohibition against unreasonable searches and seizures, the Fifth Amendment's Self-Incrimination Clause, and the Ninth Amendment's reservation to the people of nonenumerated rights.

The "Program Activity Record" has maximum destructive impact upon these relationships.

On page 143 of the Record, a comment was made about the Petitioner not taking the stand. In Griffin v. California, 380 U.S. 609 (1965) the Supreme Court reversed the jury finding of guilty holding:

> "that neither the judge nor the prosecutor could comment on the defendant's failure to take the stand, the rule stemming from the 5th Amendment's prohibition against self-incrimination as incorporated by the 14th Amendment."

On the violation of this comment, the Petitioner should have prevailed at the Civil Service Hearing.

A further comment was made about the harshness of a dismissal. In Clark v. United States, 162 Ct. Cl. 477, dismissal was vacated because of harshness. In Robinson v. California, 370 U.S. 660 (1962) incorporated 8th Amendment into 14th Amendment.

6. The Petitioner was systematically denied equality of opportunity for advancement.

On page 98 of the Record witness Ramseur testified that many persons had been hired in Research and Statistics with higher grade levels than the Petitioner; others had been upgraded over the Petitioner. The Petitioner holds a Master's Degree in Mathematics from the University of Illinois. He was in GS Grade 7 for over 12 years.

7. Since the District of Columbia Government has invoked "early out" by Reduction In Force procedures during the period of litigation for the Case before the Bar and since the Petitioner was over 51 years of age with 22 years of governmental service at the time of dismissal, he qualifies for retirement on an immediate annuity.

Equity would grant the Petitioner an immediate annuity. To be denied the same is a further denial of equal protection of the law. A person with less governmental service and younger could qualify for "early out." The "one year of service of the two years preceding retirement" creates a special classification.

CONCLUSIONS AND RELIEF SOUGHT

For the foregoing reasons, the Petitioner prays that a writ for certiorari issue: (a) That he be reinstated as a Statistician, GS-11, setp 10 with pay retroactive to February 1, 1974. (b) That he be awarded damages of $100,000.00 (one hundred thousand dollars). (c) For a ruling that he qualifies for an immediate annuity.

Respectfully submitted,

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Dated 14 October 1980

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-2411

JAMES WALKER, APPELLANT

v.

WALTER E. WASHINGTON, MAYOR
DISTRICT OF COLUMBIA, et al.

On Motion for Summary Affirmance

(D.C. Civil Action No. 78-2421)

Filed June 30, 1980

Richard W. Barton, Deputy Corporation Counsel and *Edward E. Schwab*, Assistant Corporation Counsel were on the motion of appellees for summary affirmance. *Judith W. Rogers*, Attorney, entered an appearance for appellee.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

James Walker, pro se, filed a response to appellees' motion for summary affirmance.

Before: MACKINNON and ROBB, *Circuit Judges*.

Opinion Per Curiam.

PER CURIAM: This case which comes before the motions panel of the Court involves an appeal of a District Court order of summary judgment for appellees, in James Walker's suit challenging his dismissal from the District of Columbia Department of Human Resources. Following two prior similar violations of working requirements, for which he was suspended for short periods, Walker was finally dismissed from his employment for his third violation which consisted of (1) insubordination, refusal to comply with supervisor; (2) neglect of duty, negligence in performing official duties; and (3) impeding government efficiency and economy. His violations consisted of deliberately refusing to fill out and sign "program activity records", which are time sheets of the District of Columbia Department of Human Resources from which information is drawn and submitted to the United States Department of Health, Education and Welfare for purposes of federal reimbursement. Appellees move this Court for summary affirmance. The appellant responded only after the Court issued an order to show cause. The facts and legal arguments are adequately presented in the briefs and records, and oral argument would not significantly aid the Court. We grant appellee's motion.

I

James Walker occupied the position of statistical assistant in the Office of Planning and Evaluation, Research and Statistics Division, Department of Human Resources. On December 22, 1977, he was dismissed for insubordination, neglect of duty, and impeding government efficiency and economy.

Part of Walker's job as an employee of the Research and Statistics Division was to complete time reports forms called "program activity records," which require the employee to report the time spent in each of several different activities. Each Research and Statistics employee was required to complete activity records for intermittent two-week periods in 1976 and 1977 (Nov-Dec. 1976; Jan.-Feb. 1977; April 1977; Aug. 1977). These reports formed part of a time study used to allocate administrative costs to operating programs toward which the federal government paid varying percentages. The time study was approved by the Department of Health, Education and Welfare, and information from the reports formed part of the data submitted to HEW as a prerequisite to receiving federal matching funds.

On three separate occasions, Walker refused to comply with the report requirement. The first occasion involved the period of Nov. 22-26 and Nov. 29-Dec. 3, 1976. After Walker refused to complete the program activity record and failed to articulate reasons for his refusal, he received a suspension for five-days. In early 1977, Walker again refused to fill out the required records, even after he received specific warnings to complete the reports for Jan. 24-28 and Jan. 31-Feb. 4. For this infraction, he was suspended for fifteen days, between May 16 and 30, 1977. Prior to both suspensions, Walker had the opportunity to answer the charges against him.

Again in August 1977, Research and Statistics employees were required to submit program activity records, and again (for the third time) Walker refused, despite strongly worded demands. In October, the Acting Chief of the division proposed Walker's removal. Walker replied in writing and orally; thereafter, the Associate Director of Planning and Evaluation concurred in the notice of dismissal. Accordingly, Walker was dismissed from the Department of Human Resources. Both the

dismissal and the two previous suspensions were consistent with the Table of Penalties Guide for the Department of Human Resources. (Administrative Record, Part I, at 27-29.)

Walker immediately appealed the dismissal[1] to the Federal Employee Appeals Authority (FEAA), now the Office of Appeals Operations, Merit Systems Protection Board. The FEAA decision, issued on August 9, 1978 after a hearing, affirmed the agency action of dismissal. That decision exhausted the administrative remedies that precede resort to suit.[2] Walker then brought the instant suit in the District Court, challenging the dismissal.

In District Court, Walker asked that his dismissal be declared null and void, and that he be reinstated with compensation for lost pay, or retired with an annuity. His complaint focused on the alleged constitutional violations created by the requirement that he complete the program activity records.[3] After a review of the admin-

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[1] Simultaneously, Walker filed suit in the District Court, challenged the dismissal (No. 77-2009). Judge Richey dismissed that suit on January 12, 1978, for failure to exhaust administrative remedies, and on February 10, 1978, Judge Richey refused to vacate the January dismissal.

[2] Although the FEAA decision exhausted Walker's remedies, Civil Service regulations permitted Walker to request the Appeals Review Board (now the Office of Appeals Review, Merit Systems Protection Board) to reopen and reconsider the FEAA decision. Walker made that request. After reviewing the FEAA decision and the administrative record, the Office of Appeals Review denied Walker's request on August 9, 1979.

[3] In the memorandum accompanying the complaint, Walker attempted to make the suit a vehicle for his other grievances against his former employer. He alleged, for example, that previously a nonveteran was promoted above him; that there was a "break in the chain of command" in the employer agency; and that he was denied equality of advancement (but with no indication that he suffered discrimination pro-

istrative record, the court concluded that Walker's dismissal had been proper. Accordingly, the court granted summary judgment for the defendants.

Walker appealed to this Court from the District Court's grant of summary judgment, and Appellees have moved for summary affirmance of said judgment.

II

The decisions of this Court establish that the scope of review in employee discharge cases, such as we have here, is limited. Such cases, although framed as original district court actions for reinstatement and related relief, are decided on the basis of the administrative record and governed by principles applicable to judicial review of administrative action. *Polcover v. Secretary of the Treasury*, 477 F.2d 1223 (D.C. Cir.), *cert. denied*, 414 U.S. 1001 (1973). Discretion lies in the hands of the agencies involved, and the Court will not substitute its own judg-

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hibited by the various civil rights provisions). Evidently, Walker did initiate at least one personnel action to get a promotion. (Deposition of James Walker, at 24.)

Walker seemed to view his other complaints more as additional ammunition in his fight to regain his position than as actual causes of action. He gave no indication that, as to those complaints, he had followed the proper grievance procedure within the Department of Human Resources in a timely manner. Moreover, his official notice of appeal to the FEAA focused on the dismissal; only in accompanying papers did he bring up his other complaints. In its opinion, the FEAA mentions Walker's extraneous contentions, but does not deal with them, because they are not related to the merits of the charge that led to Walker's dismissal.

The District Court also refused to rule on the merits of Walker's other allegations, which were wholly unrelated to the matter of dismissal. We agree with the District Court's statement that Walker should have timely sought his remedy through regular channels, instead of raising those allegations in a proceeding about an unrelated matter.

ment for that of the agencies. "Review is thus limited to whether the agency denied the employee his appropriate procedural rights and whether the decision to remove the employee was arbitrary and capricious." *Gueory v. Hampton*, 510 F.2d 1222, 1225 (D.C. Cir. 1974).

Moreover, no special deference is paid to the decision of the District Court. Instead, this Court is to review the record and determine anew if the agency committed procedural or substantive error, or if the agency action was arbitrary or capricious.[4] *Polcover*, 477 F.2d at 1226-27. Because appellees now ask for summary affirmance of the judgment of the District Court, however, it is necessary to address briefly one threshold issue considered by the District Court.

Jurisdiction is that threshold issue. Defendants do not argue that the D.C. officials are immune from suit.[5] They allege, however, that Walker had not properly invoked the jurisdiction of the District Court, and on court order defendants submitted a memorandum on jurisdiction. The court subsequently concluded that it had jurisdiction,

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[4] Congress has recently remedied this seemingly duplicative review. The Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, provides for review of final personnel actions of the Merit Systems Protection Board in the Court of Claims or a United States Court of Appeals, 5 U.S.C. § 7703(b)(1). Cases to which this provision applies will no longer be subject to review in both the district and the appellate court. The law, however, does not apply to personnel actions, like Walker's, pending on the January 1979 effective date of the statute. *See Kyle v. ICC*, No. 79-1307 (D.C. Cir. October 26, 1979).

[5] In his response to the order to show cause, Walker cites Owen v. City of Independence, —— U.S. ——, 48 U.S.L.W. 4389 (April 16, 1980), as applicable to his case. That decision, which involves municipalities and immunity under 42 U.S.C. § 1983, is inapposite in this case, which poses no question of immunity under § 1983.

conferred by 5 U.S.C. § 702. Two problems exist with this source of jurisdiction. The first is that, although the suit required a review of the FEAA decision, the suit itself was against officials of the District of Columbia, in their official capacity. Suits against officials are in actuality suits against the employing government, *cf. Zapata v. Smith*, 437 F.2d 1024, 1025 (5th Cir. 1971) (U.S. government employer). The government involved here, however, is the District of Columbia, and section 701(b)(1)(D) prescribes specifically that the government of the District of Columbia is not an "agency" subject to review under section 702.

Secondly, even if the suit can be construed as asking review of the action of the FEAA rather than against officials of the District of Columbia, section 702, without another supporting statute, is insufficient to confer jurisdiction. At one time, this circuit had concluded that section 702 provided an independent source of jurisdiction that empowered the district courts to review agency action. *Pickus v. United States Board of Parole*, 507 F.2d 1107, 1109 (D.C. Cir. 1974). Now, however, the Supreme Court has made it clear that section 702 is not an independent jurisdictional provision. *Califano v. Sanders*, 430 U.S. 99, 104-07 (1977). Thus, were jurisdiction to be founded only on section 702, the suit would fail.

In his complaint Walker based jurisdiction on several provisions, most of which are clearly inapposite. Among the provisions, however, was 28 U.S.C. § 1331. In the memorandum on jurisdiction in the district court, defendants acknowledged that Walker had based his suit on violations, evidently alleged in good faith, arising under the Constitution. They argued, however, that the complaint does not contain an averment as to the amount

involved.[6] Walker's jurisdictional statement cites only the statutory sections on which he bases jurisdiction, and does not allege that the amount in controversy exceed $10,000. Nevertheless, it is clear from the face of the complaint that Walker's claim involves more than $10,000: he demands more than $16,000 in lost wages or $40,000 in retirement benefits. Although this amount does not appear with Walker's reference to section 1331, an amount alleged in an *ad damnum* clause generally supports the jurisdictional amount requirement. *E.g.*, *Wade v. Rogala*, 270 F.2d 280 (3d Cir. 1959). Especially in light of Walker's *pro se* status, we conclude that his complaint satisfied the requirements for federal question jurisdiction.

III

Having concluded that the District Court properly assumed jurisdiction of this case, we reach the merits of the summary affirmance motion. We note that a party who seeks summary disposition of an appeal must demonstrate that the merits of his claim are so clear as to justify expedited action. *United States v. Allen*, 408 F.2d 1287, 1288 (D.C. Cir. 1969). We believe that the merits of this appeal are so clear as to make summary affirmance proper.

This Court's role is to review the record, with an eye toward procedural or substantive error and arbitrary or capricious agency action. *Polcover v. Secretary of the Treasury*, 477 F.2d at 1226-27. The agency action, as outlined in the administrative record, evidences no proce-

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[6] A recent amendment of § 1331 provides that the jurisdictional amount need not be alleged in suits against the United States, its agencies, officers, or employees. Employees of the District of Columbia, however, are not employees of the United States. Bradshaw v. United States, 443 F.2d 759 (D.C. Cir. 1971). Thus, the amendment does not absolve Walker of his burden of alleging the required jurisdictional amount.

dural error. Walker refused for the third time to fill out the program records; as on other occasions, his supervisor gave him a deadline for completing the reports. Walker did not meet the deadline, nor did he articulate reasons for his refusal to complete the reports. Pursuant to Civil Service regulations, Walker received notice of the proposed dismissal at least 30 days in advance of the proposed action. That notice set forth in detail the reasons for the dismissal; informed Walker of his right to reply orally and in writing; and directed him to the location of material relied on to support the proposed dismissal. (Administrative Record, Part I, at 77-78.) Walker replied both in writing and personally, and his replies were considered in the final decision to dismiss, made by a Department of Human Resources official at a higher level than the official who had proposed the dismissal. On being informed of the final dismissal decision, the agency informed Walker of his right to appeal that action to FEAA. Walker took advantage of that right. He had a full hearing before FEAA, after which the agency issued a detailed decision confirming the dismissal.

Walker had ample opportunity to challenge his dismissal, and he took advantage of that opportunity. Neither the Department of Human Resources nor FEAA ignored appropriate procedure in deciding to dismiss Walker and in upholding that dismissal.

The constitutional issues that Walker raises to challenge his dismissal are without merit. He alleges that requiring him to complete the program activity record denies equal protection and due process, leads to self-incrimination, and is "an illegal search of the mental process and physical agility of the Appellant." However, study of time reports is a traditional method used in analyzing the working efficiency of employees and working units. (Brief for appellant, at 3.) Walker articulates

the nature of the violations he alleges only vaguely, and his claims are clearly frivolous.

He argues, for example, that his rights were violated because not all Department of Human Resources employees are required to complete the program activity records. Nonetheless, employees in the Research and Statistics Division are so required, and Walker is treated no differently than other employees within his own division.

Walker's self-incrimination argument is also without merit. The program activity records have a legitimate business purpose: to allocate administrative costs, as part of the process of receiving matching federal funds. The information Walker was required to submit will not subject him to criminal charges. Moreover, Walker himself admits that he does not fear even employer discipline for failing to work a full day. Instead, on deposition, he claimed that just having to sign the forms is "demeaning, degrading, and incriminating." (Deposition of James Walker, at 39.) The self-incrimination claim is frivolous. Walker's "illegal search" claim is also frivolous. The program activity requirement is not a search into his property or personal effects. It merely requires him to account occasionally for the time for which he is being paid.

Walker has not established that the program activity record requirement violates his constitutional rights. Moreover, the agency did not dismiss him without giving him an opportunity to be heard and to have his views considered by the decisionmaker. And the dismissal complied with the agency's standard penalties for the infractions Walker committed for the third time within a year. Dismissal is not a harsh remedy for a third instance of flagrant insubordination. Efficiency could be said to require such action.

Because the agency action was not procedurally or substantively defective, or arbitrary and capricious, the motion for summary affirmance is granted.

Judgment accordingly.

APPENDIX B

[Filed Jul 16 1980]

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

September Term, 1979

Civil Action No. 78-2421

No. 79-2411

James Walker,
Appellant,

v.

Marion E. Barry, Mayor, District of Columbia, et al.

BEFORE: MacKinnon and Robb, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing, it is

ORDERED, by the Court, that appellant's aforesaid petition for rehearing is denied.

Per Curiam
FOR THE COURT:
/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX C

THE WASHINGTON STAR Tuesday, May 27, 1980

District Notes

'Early Out' Retirements Offered City Workers

Mayor Marion Barry Jr. has announced a plan under which some city employees will able to retire early. He says he expects the voluntary "early out" retirements to save the city about $1.5 million a year in salary costs.

Barry estimates that more than 400 city employees will take "early outs." Of some 28,000 employees under the District's civil service system, an estimated 3,500 would be eligible for early retirement.

On the basis of past experience, the mayor's announcement last Friday said, about 12 percent of those eligible are likely to take the "early out" option. The average salary of the eligible employees is $22,000, the city estimates.

Barry said the early retirement plan, which has been approved by the federal Office of Personnel Management, will "help stem the tide of reductions-in-force" — layoffs — that he has had to order as one means of reducing the city's budget deficit.

Eligible District employees will have from June 1 through Dec. 31 to exercise the early retirement option. An "early out" will be available to any District employee who has reached age 50 and has at least 20 years of work in the civil service or any employee of any age with at least 25 years of service.

Those eligible must also have worked under the civil service system for at least one of the two years preceding retirement.

Under the city's regular system, a civil service employee must be at least 55 years old to be eligible for retirement.

Barry suggested that employees interested in taking an "early out" contact the personnel officers in their agencies.